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Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

JAMES MICHAEL SCHROEDER,

*Petitioner,*

vs.

THE STATE OF TEXAS,

*Respondent.*

**Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourth Supreme Judicial District Of Texas**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Should the holding of *Roe v. Wade,* that unborn humans are not persons under the fourteenth amendment be reconsidered and overruled in the context of the applicability of the justification defenses of necessity and protection of third persons to interference with the killing of unborn human beings by abortion?

Is it unconstitutional for Texas statutes providing for the defense of justification to exclude unborn human beings from the class of persons for whose protection that defense may be asserted?

Is the categorical legal exclusion of the necessity defense solely because the harm in question is not a "legal harm" an unconstitutional arbitrary denial of a valid criminal defense?

Is the categorical legal exclusion of the necessity defense solely because the harm in question is not a "legal harm" an unconstitutional denial of equal protection of the laws?

Is the categorical legal exclusion of the necessity defense solely because the harm in question is the legal killing of human children before birth unconstitutional invidious discrimination against unborn humans?

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## OPINION AND PROCEEDINGS BELOW

The opinion of the Texas Court of Appeals for the Fourth Supreme Judicial District is not published, but is reprinted in the appendix hereto, p. 1, infra.

The judgment of the trial court was dated and entered on June 25, 1991. The Fourth Supreme Judicial District Court of Appeals affirmed the judgment of the trial court on January 29, 1992. A Petition for Discretionary Review From Judgment was filed in the Texas Court of Criminal Appeals on March 4, 1992, and was denied on April 15, 1992.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the Preamble, Fifth Amendment Due Process Clause, Sixth Amendment, Fourteenth Amendment Section 1 relating to the Due Process and Equal Protection Clauses, and Section 5, the enforcement authority of the Fourteenth Amendment. U.S. statutory law inolved is 1 U.S.C. 1, the Congressional definition of a "person". Texas statutory laws involved are Texas Penal Code numbers 1.07(a)(16) the definition of harm; 1.07(a)(17), the definition of an individual; 1.07(a)(27), the definition of a person; 9.22 defense of necessity; and 9.33 defense of third persons. (The text of the constitutional and statutory provisions are reported in the appendix on pages 7-9.)

## STATEMENT OF THE CASE

Following a jury trial in June 1991, petitioner was found guilty of criminal trespass, Texas Penal Code 30.05, and sentenced by the trial court to seventy five days in jail and a $1,000.00 fine.

Petitioner admitted the technical violation of trespass, and offered substantial defense evidence by his testimony and witnesses for justification by necessity, Texas Penal Code 9.22 and protection of third persons, Texas Penal Code 9.33, most of which the trial court admitted. Petitioner asserted those defenses on the ground that his refusal to leave his position in front of the New Women's Clinic's door was justified as a necessary means to save the lives of unborn children whom he knew were scheduled for abortion at that facility at the time of the trespass. No evidence was offered by the State to oppose the defense evidence for necessity or protection of third persons, and petitioner's statement of facts was undisputed on appeal.

## PERTINENT FACTS:

*Petitioner* testified to the jury that he did not leave and cease blocking the entrance of the New Woman's Abortion Clinic at 419 San Pedro when ordered to do so because he knew from intelligence gathered and from his own observation that "[t]here were women there who were going to have their unborn children terminated in that abortion clinic that day and that they were still there present and the clinic was still open for business." (SF 30-31). Petitioner's goal was to block the entrances of the abortion clinic to have a chance to talk with women trying to get in to advise them they were going to take a human life. (SF 31).

He based his beliefs to protect the human rights of unborn children on the United States Supreme Court case of *Levi v. Louisiana* in 1968 which held that the test for constitutional protection was "[t]hat it was a human and it was alive and it had being and that the unborn child had all of those things." (SF 36). He testified that he has read court decisions that unborn fetuses were human persons, they were individual human beings, and could receive social security benefits. (SF 36-37). He testified that the Declaration of Independence proclaims the Creator created all men "human beings" and gave the inalienable right to life, and "[t]hese are rights that do not come from men. They come from a higher authority and men cannot take these rights away from anybody." (SF 37-38). He testified that the preamble to the Constitution of the United States provides for the rights of ourselves and our posterity, and "posterity" according to Webster is an unborn generation. (SF 38).

He had knowledge of when the unborn child's heart began beating, brain waves were present, and the unborn child is formed in his structure at 12 weeks, feels pain, that abortions are done from ten to twenty four weeks, that he has seen videos of abortions and aborted children, that he based his beliefs on such medical evidence (SF 41-42), and that it is his understanding there is no difference between a born child and an unborn child. (SF 45-46).

He understood the United States Supreme Court in the *Webster* case permits restrictions on abortions and that Texas prohibits abortions after twenty four weeks. (SF 47). His beliefs for the protection of unborn children are also based on the United Nations Declaration on the Rights of Children providing that unborn children have the legal right to life (SF 49), and such reasons require

"[t]hat I must continue to protect the unborn child in the best way that I know from the imminent death that unborn children face in this country right now." (SF 53).

*Sylvia Arangua* testified that she was standing peacefully at a door of the abortion clinic with petitioner who was at her side attempting to stop killing going on and that she was holding a picture of an aborted baby (DX 1 admitted), attempting to convey what they felt was the truth about what was going on inside the abortion clinic. (SF 61-69).

*Dr. David D. Vause, M.D.* testified the life of a human, of a particular individual human, is initiated at the time of conception from the combination of the genetic material from the father and the mother (SF 95), that the genetic material produces a totally unique individual that has not existed before and will never exist again (SF 96), that there has been an immense amount of advance in recent years in our understanding of the process of human growth, development and life within the womb before birth (SF 99), that as early as 16 weeks from conception babies are removed from the womb, surgery performed and they are replaced in the womb (SF 100), and that there is no medical evidence that human life does not begin at conception. (SF 102).

*Dr. Marie Francoise Philippe-Meaney, M.D.* testified that she counsels women considering abortions, some of whom have had abortions, and that she recognizes observable harm in persons who have had abortions (SF 108), that she explains to women considering abortions that a baby's heart starts beating within twenty five days from conception, that brain waves begin within forty five days from conception (SF 109), that there is no genetic difference in human beings from conception to old age, that

growth and development of a human being is a continuous process as the same individual person from the zygote until it dies (SF 111-112), that the unborn child is not a part of the mother's body, and that the unborn child in its mother's womb is similar to the astronaut who is in his space capsule and dependent upon that space capsule for his existence. (SF 113).

*John Goode Haring*, attorney, testified that under the Texas Penal Code 1.07(16), harm is defined as "Anything that may be reasonably considered to be a loss, injury or disadvantage" (SF 122), that Texas Family Code 15.021 regarding paternity suits prior to birth calls the unborn human an "unborn child" (SF 123), that the United States Constitution secures the blessings of liberty to "our posterity", and that "[p]osterity is defined as all descendants of a person in a direct line to the remotest generation." (SF 123), and that the United States Supreme Court protects the rights of unborn children for inheritance, social security benefits, and recovery for personal injuries. (SF 124).

Before submission to the jury the petitioner requested charges to the jury on the defense of third persons, Texas Penal Code 9.33, and the defense of necessity Texas Penal Code 9.22 (SF 126), and provided a necessity defense charge (Defendant's exhibit No.8). Petitioner further objected to the trial court's failure to include those charges to the jury. (SF 128). The trial court gave no reasons for denying petitioner the requested charges, but the court of appeals sustained the trial court denial of the necessity charge holding "The defense of necessity requires that the conduct to be prevented be a legal harm . . . " and, "There is nothing in the record to indicate that anyone within the clinic was engaging in any activity

that constitutes a legal harm, as the courts have interpreted that term." The court of appeals also sustained the trial court denial of petitioner's requested charge for Texas Penal Code 9.33 justification defense of third persons holding "One element of the defense of third persons is that the force protected against must be unlawful, an issue that has also been decided adversely to appellant." The court of appeals cites cases that the conduct of abortion is not illegal and that the force of abortion is not unlawful because under *Roe v. Wade,* 410 U.S. 113 (1973) an unborn child is not at the present time either under the Texas law or the law of the land a person entitled to Fourteenth Amendment protection. Opinion of the court of appeals, Appendix 2-3.

## REASONS FOR GRANTING THE WRIT

## ARGUMENT

### I. INTRODUCTION

The present case calls into question the validity of the holding in *Roe v. Wade* that unborn children are not "persons" possessing a right to life and to the equal protection of law under the fourteenth amendment. The rulings below relied on *Roe v. Wade* in refusing to allow an unborn human being to be the beneficiary of efforts to save his life pursuant to the defense of third persons or necessity, even though such efforts would be allowed to save a newborn infant younger from conception than other unborn children still in the womb. Only the unborn, among human beings, is decreed unworthy of such life-saving efforts. Indeed such efforts would be allowed in appropriate circumstances to save property or the life of a pig. The denial of the defense of third persons or necessity with respect to the unborn child is a palpable

injustice at odds with the norms of science as well as of common fairness.

The refusal of this Court in *Roe v. Wade* to recognize the reality of unborn human life is anachronistic in the light of modern medical and technological developments. As a result, *Roe* is rightly regarded as conferring a legal right to execute an innocent human being.[1] Given the undisputed facts that life begins at conception and that every abortion kills a human being, it should be no wonder that petitioner and tens of thousands like him are willing to violate trespass laws in order to protect the lives of unborn children scheduled for execution. This Court should reconsider and overrule *Roe v. Wade* and hold that statutes involved herein are unconstitutional if they exclude unborn human beings from the class of persons for whose benefit the justification defenses of necessity or protection of third persons may be asserted.

The constitutionality of *Roe v. Wade* however has no bearing on a criminal defendant's right to jury instructions on the defense of necessity where the evidence is sufficient for the statutory requirements. The Texas courts did not find that the Texas Legislature had excluded the necessity defense for criminal trespass and they did not find insufficiency of evidence for the requested jury instructions. The necessity defense was denied solely

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[1] A trial court in New Jersey, in finding the defendant guilty of trespass, recently observed: " . . . based upon the undisputed medical testimony by arguably the foremost authority in genetics in the world, I found that human life begins at conception, and that *Roe v. Wade* permits a legal execution of that human being," *State of New Jersey v. Loce*, Municipal Court of New Jersey, Law Division, Morris County, April 29, 1991. The authority in genetics to whom that court referred is Dr. Jerome Lejeune, of the University of Paris.

because the harm in question was determined not to be a legal harm. That selective legal exclusion for the justification defense of necessity denies constitutional protections of the fifth, sixth and fourteenth amendments, amended Texas legislation, is irrational, and is invidiously discriminatory to unborn human children.

## II. THE TERM "PERSON" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS INCLUDES ALL HUMAN BEINGS.

The fifth amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fourteenth amendment to the Constitution of the United States provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, Section 1. This amendment secures protection for the basic, minimum human rights any state must respect. It is imperative that categories of human beings not be read out of the terms of this amendment without the clearest demonstration of justification for such exceptions.

If there is any term whose broad scope demands unconditional respect, it is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even minimum human rights and is no better off than property, entirely subject to the whim of the owner and whatever regulations the state may impose. The Constitutional authority to determine who is a "person" for fourteenth amendment protection is the Congress of the United States, and the world authority to

determine who is a "person" entitled to human rights protection is the United Nations.

Congress was given the constitutional authority under Section 5 of the Fourteenth Amendment to enforce by legislation the provisions of that amendment and has defined a "person" for fourteenth amendment protection in 1 United States Code 1, as an "individual", and has no requirement of birth.

> In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include . . . individuals.

Individuals are defined in Webster's Third New International Dictionary (1981) as " . . . a single or particular being . . . a single human being . . . a particular person . . . the product of a single fertilization. . . . "

The Texas Penal Code defines a "person" as an "individual", 1.07(a)(27), and under 1.07(a)(17), an "individual" is "a human being who has been born and is alive". This definition is unconstitutional because it denies fourteenth amendment rights to the class of unborn humans not excluded by the Congress of the United States who alone have the constitutional authority to define "persons" for Constitutional protection.

The United Nations has also included the unborn human as a "person" for legal protection.

> Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

*United Nations 1959 Declaration on the Rights of the Child.*

"[T]he Declaration is as solid a moral framework for children's rights today as it was thirty years ago." *United Nations 1989 Declaration on the Rights of the Child.* (Adopted unanimously by the United Nations General Assembly on 20 November, 1989.)

The Supreme Court has held that the fictitious entity of a corporation is a "person" for fourteenth amendment equal protection, *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886) and for due process protection in *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889). These cases stand for nothing if they do not stand for the principle that the word "person" in the fourteenth amendment is not to be construed in the strictest or narrowest sense. There is no reference in the constitution that fictional legal entities should be included as persons for constitutional protection, whereas unborn humans are specifically referred to in the Preamble of the Constitution, " . . . (to) secure the blessings of liberty to ourselves and our posterity . . . ," and presently existing unborn humans are unquestionably living posterity. There can be no pretense of consistency unless and until this Court holds that a corporation is not a person or that an unborn human child is.

There is no doubt that citizens of hostile nations, children under eighteen, convicted, comatose or mentally disabled individuals are each a class of persons. This is so, not because members of each class can prove their inclusion under the fourteenth amendment, but because they are included by virtue of their humanity. They are humans, live, and have their being. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children). Therefore, "[t]hey are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Id.* Human offspring conceived but not yet born are likewise "humans, live and have their being." They are "a form of human life," *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion), as are infants, toddlers, teens, adults, and the elderly. They do not need to overcome any additional hurdles in

order to establish their right to presumptive inclusion within the term "person" as used in the Constitution, and there is no justification for the arbitrary exclusion of such children from the protection of basic human rights under the Constitution.

## III. THERE IS NO JUSTIFICATION FOR EXCLUDING FROM THE TERM "PERSON" THE CLASS OF HUMAN BEINGS CONCEIVED BUT NOT YET BORN.

In *Roe v. Wade*, 410 U.S. 113, 158 (1973), a majority of the Court read into the term "person" in the fourteenth amendment an exception for unborn children. There is no valid justification for the creation of such an exception.

### A. *Roe v. Wade* gave no valid basis for creating an exception for unborn children.

The *Roe* Court made several arguments to support its conclusion that the word "person" does not include the unborn. None of these arguments withstands analysis.

#### 1. Alleged absence of precedent.

First, the Court observed that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." 410 U.S. at 157.

This observation is incorrect as a matter of fact. In *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio, 1970) (three-judge court), the court rejected a challenge to Ohio's abortion laws, holding that the implied right to privacy

> must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no person shall be deprived of life without due process of law. The difference

> between this case and Griswold [overturning a ban on the use of contraceptives] is clearly apparent, for here there is an embryo or fetus incapable of protecting itself. *Id.* at 745-46.

As the court in *Steinberg* explained, "a new life comes into being with the union of human egg and sperm cells," *Id.* at 746, and "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it," *Id.* at 746-747.

As a legal matter, an absence of case support is irrelevant, and there may well not be cases holding newborn infants or other classes of humans are persons which would not mean they are beyond the scope of the Fourteenth Amendment.

**2. Postnatal application of other constitutional provisions.**

Second, the Court noted that the use of the word person in "nearly all" other parts of the Constitution "is such that it has application only postnatally. None [of these uses] indicates, with any assurance, that it has any possible prenatal application." 410 U.S. at 157 (footnote omitted). Such exclusions obviously do not imply that those excluded (e.g., with respect to Representatives, those under age twenty-five) are not persons. Obviously Constitutional postnatal applications are not applied to corporations, for they can never be counted in any census, or be a representative, senator or president. The unborn human is not a fictional entity, as a corporation, requiring an artificial extension of the meaning of "person", but are real creatures of flesh and blood, whose brains are working, whose hearts are pumping, whose legs are kicking. Granting constitutional protection to

corporations and denying such protections to unborn human beings is invidious discrimination.

### 3. Apparent inconsistency of state anti-abortion laws with personhood of unborn children.

Third, the Court pointed to allegedly fatal inconsistencies in the abortion laws of Texas and other states.

> [I]f the fetus is a person who is not to be deprived of life without due process of law, . . . does not the Texas exception [for abortion necessary to save the life of the mother] appear to be out of line with the Amendment's command? . . .
>
> . . . If the fetus is a person, why is the woman not a principal or an accomplice [to an unlawful abortion]? . . . If the fetus is a person, may the penalties be different [for abortion and first degree murder]? 410 U.S. at 157 n.54.

Here the *Roe* Court confused two distinct issues: the constitutionality of the Texas abortion laws, and the constitutional personhood of unborn children. A state, of course, may not exclude from the general protection of the criminal law a particular class of innocent persons. This fundamental obligation does not disappear, however, simply because a state fails to comply with it. In *Brown v. Board of Education*, 347 U.S. 483 (1954), for example, it would have been outrageous to suggest that the long history and widespread practice of segregated public education meant that black people were not persons. On the contrary, this segregation represented a constitutional violation. Similarly, the denial of equal statutory treatment to unborn children does not support a categorical denial of constitutional protection to such children. As the Court emphasized in *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (Brown II), "the vitality of these

constitutional principles cannot be allowed to yield simply because of disagreement with them." If the state in fact is denying due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny the personhood of the victimized class. To hold otherwise would be to deny the possibility of unconstitutional action by states, and to turn civil rights litigation upside down.

**4. Alleged laxity of nineteenth century abortion laws.**

Fourth, the Court cited its "observation" that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer" than in 1973, 410 U.S. at 158, presumably as evidence that the framers and those who ratified the fourteenth amendment did not regard unborn children as human persons.

On this point the *Roe* opinion refutes itself. The fourteenth amendment was adopted in 1868, precisely at the time when the scientific discovery of the humanity of the unborn had become widely known, and precisely at the time when this discovery prompted vigorous opposition to abortion by means of numerous statutory bans. See 410 U.S. at 129 (observing that abortion laws in effect in 1973 "derive from statutory changes effected, for the most part, in the latter half of the 19th century"); *Id.* at 141 (noting the "anti-abortion mood prevalent in this country in the late 19th century"); *Id.* at 141-42 (noting that the concern of the medical profession for prenatal human life destroyed by abortion "may have played a significant role in the enactment of stringent criminal abortion legislation during that period") see also *Id.* at 174-77 (Rehnquist, J., dissenting) (noting the multiplicity of state

and territorial anti-abortion laws at the time of the adoption of the fourteenth amendment).

### B. No Other Basis Exists For Creating an Exception for Unborn Children.

*Roe* failed to give any justification for reading an exception for unborn children into the scope of the term "person" as used in the fourteenth amendment, and no valid justification appears from other sources. On the contrary, history, science, logic, law and justice all reject such arbitrary limitation on personhood as birth or viability.

#### 1. The framers of the Fourteenth Amendment did not distinguish between "human beings" and "persons."

*Roe v. Wade* distinguished between human beings and persons, holding that unborn children were not persons even if they were human beings. 410 U.S. at 159 ("We need not resolve the difficult question of when life begins"). Such a distinction, however, was foreign to the men who proposed and adopted the fourteenth amendment. Examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, *every human being* within its sphere . . . from the President to the slave, is a *person.*" Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).

There is no basis from the framers of the fourteenth amendment for the conclusion that a class of human beings might be excluded from the persons protected under the Fourteenth Amendment. As forcefully stated by Representative Joshua R. Giddings:

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident"

> truth that every human being holds from the Creator an inalienable right to live. . . .
>
> . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders? Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (emphasis in original).

**2. Science rejects the exclusion of unborn children from the class of human beings.**

Science does not purport to identify the value society should place upon human life, but shows indisputably that each individual human organism begins life at the moment of fertilization. Thus science offers no valid basis for excluding prenatal human life from the category of "persons" protected under the fourteenth amendment.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is "person" as that term is used in the Constitution, one must at least recognize first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. *Thornburgh v. American College of Obstets. & Gynec.*, 476 U.S. 747, 792 (1986) (White, J., joined by Rehnquist, J., dissenting).

The facts stated by Justice White are scientifically indisputable, and although science cannot identify a spiritual soul or assign a moral value to a given creature, science does identify individual members of a particular

species, such as homo sapiens. Unborn children are unquestionably individual members of this species, and thus the conclusions of science utterly reject the arbitrary exclusion of prenatal humans from the term "person."

### 3. Logic repudiates the creation of an exception for unborn children in the term "person."

According to *Roe v. Wade*, unborn children are non-persons, and abortion of such children is a constitutional right. But it is plainly absurd to draw such an indefinite a border as birth (or, for that matter, viability) between what is constitutional liberty and what is homicide. The point of detachment from the mother – whether by normal birth, induced delivery, or abortion – fails as a logical point for creating an exception to personhood, because for a considerable period before birth, the unborn child is viable, and thus capable of surviving premature delivery. The child residing in the maternal womb is essentially indistinguishable from the child of identical age who has been born prematurely. The total meaninglessness of birth as a criterion for personhood is more apparent today than ever, when induced, "scheduled" deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within their mothers, and when irremediably harmed mothers are sustained on life support systems solely to await the delivery of the uninjured child within the womb. Birth changes where the person is, not what the person is.

Viability is no better a concept for drawing constitutional lines because the unborn is the same biologically and genetically before as after viability. Justice White, in his dissent in *Thornburgh*, elaborated upon this point with regard to state interest in protecting human life:

> The government interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interests, if compelling after viability, is equally compelling before viability. 476 U.S. at 795 (White, J., joined by Rehnquist, J., dissenting) (footnote omitted).

The same rationale applies to constitutional personhood, i.e., the claim to minimal protection of basic human rights. One's capacity for survival is "constitutionally irrelevant" because "the character of the entity does not change at the point of viability."

**4. Legal consistency is not served by the exclusion of unborn children from the protection of the fourteenth amendment.**

The integrity of the law is not served, but rather is harmed by the arbitrary exclusion of unborn children from constitutional protection. The history of legal developments of the past century and a half regarding prenatal human life has been a history of increasing recognition and protection of unborn children. The exception of legalized abortion to the fourteenth amendment represents a reversion to outmoded and unworkable legal fictions, and leads to disrespect for the law. Courts recognize the right of a live child to recover for prenatal injuries, even if inflicted prior to viability, and allow recovery for the

wrongful death of a child born alive whose injuries were inflicted before birth. Thirty-four states now allow recovery for the wrongful death of a viable unborn child who dies while still in the womb. Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child, 84 A.L.R. 3d* 411 (1978).

*Roe's* imposition of birth and viability requirements (as predicates for personhood and a compelling state interest in protecting prenatal life, respectively) therefore represented a major setback in the law. *Roe* embraced the very same distinctions that the law of torts (and, to a lesser extent, crime) was in the process of finally and completely repudiating.

The consequences in terms of respect for the law are all too obvious. The jealous ex-husband who forcibly aborts his pregnant ex-wife's child may be convicted of homicide, but the professional abortionist cannot be. A woman who is hit by a car and miscarries on the way to an abortion clinic may sue for the loss of the child she planned to destroy. A disabled child may recover large sums to compensate for harm suffered in the womb, but the mother could have had that same child killed because she did not want a handicapped baby.

Such contrasts make a mockery of the law. The malleable and uncertain lines separating viability from nonviability, or prematurity from pregnancy, simply cannot support the differences between constitutional rights and crimes. The shifting sands of consent to abortion cannot support the distinction between homicidal torts and constitutional liberties.

Either the unborn child is a person, or he is not. While the law in theory can consider someone a person for some purposes and not for others, in practice such artificiality results in contempt for a legal system full of

technicalities that contradict reality. It is beyond reason that an unborn child should have a constitutional right to be protected from injuries but have no right to life. If the term "person" in the fourteenth amendment can be construed broadly enough to admit a nonhuman fictional entity such as a corporation into its protection, it also can and should be read to include flesh and blood unborn humans. The integrity of the legal system calls for inclusion, not exclusion, of the class of unborn children within the term "person" in the fourteenth amendment.

### 5. Justice demands the inclusion of unborn children within the term "person."

Finally, considerations of justice call for the renunciation of the arbitrary denial of equal protection to children who happen to reside within their mothers' wombs.

Not everyone has every right. But no one except a person has any rights. Thus *Roe v. Wade* asked the wrong question when it queried whether unborn children were "recognized in the law as persons in the whole sense," 410 U.S. at 162. The issue is not whether children conceived but not yet born should receive the full range of the rights of citizenship, such as the right to vote, but whether they may lay claim to the barest minimum of human rights: "the right to survive on a basis of equality with human beings generally," *Rosen v. Louisiana State Bd. of Medical Examiners,* 318 F. Supp. 1217, 1226 (E.D, La.1970), vacated, 412 U.S. 902 (1973). The law prior to *Roe* had generally accorded that much recognition, and more, to the child in the womb. And in so doing, the laws recognized a difference in kind between unborn children and tonsils, worms, or trees. This difference is the difference of personhood.

This difference, then, relates to the inherent dignity of man. Personhood is what characterizes the collection of diverse entities that together compose the human race. As Justice Brennan put it in another context,

> At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. *Furman v. Georgia*, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (overturning Georgia death penalty).

If this observation holds true with regard to the life of a convicted felon, it is much more so for the innocent helpless baby growing in the womb. The answer to the fundamental moral issue, moreover, is clear: society "must treat its members with respect for their intrinsic worth as human beings," for "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Id.* at 270, 303 (Brennan, J., concurring).

*Roe v. Wade* created an exception to personhood where none existed or could exist. This Court should recognize the right to life and equal protection of all those who are in fact human beings, regardless of age, size, health, or condition of dependency. The Texas statutes providing for the defense of necessity and protection of third persons are unconstitutional if they exclude unborn human beings from the class of persons for whose protection those defenses may be recognized. Because petitioner in the present case acted to save the lives of unborn babies subjected to the ultimate denial of their rights in the abortion clinic where he intervened, his conviction should be set aside.

## IV. THE CATEGORICAL LEGAL EXCLUSION OF THE NECESSITY DEFENSE, SOLELY BECAUSE THE HARM IN QUESTION IS THE ABORTION OF A HUMAN CHILD BEFORE BIRTH IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY, ANOMALOUS AND INVIDIOUSLY DISCRIMINATORY.

### A. The denial of necessity defense instructions to the jury was arbitrary, denying constitutional protections of the fifth, sixth, and fourteenth amendments to the United States Constitution.

The trial court made no findings that there were any legislative exclusions for petitioner's use of the defense of necessity or that there was insufficiency of evidence to meet all the requirements of the Texas statutory defense of necessity, Tex. Penal Code 9.22. The only basis for denial of petitioner's requested charge to the jury on the defense of necessity was that the harm petitioner tried to avoid was not a legal harm, which is not a requirement of the statutory defense of necessity and is an arbitrary exclusion for a valid criminal defense.

The constitutional right to a fair trial, due process and equal protection of law guaranteed by the fifth, sixth, and fourteenth amendments requires that defendants have the opportunity to present their defenses fully. *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Faretta v. California*, 422 U.S. 806 (1975).

> . . . in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law. . . . Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, *he has the right to*

> *establish a defense. This right is a fundamental element of due process of law. Washington v. State of Texas, Supra,* 20. (Emphasis added).

The law is clear, where the trier of fact is a jury, judges must be careful not to usurp the jury's role so that they do not interfere with a defendant's constitutional right to put on a defense.

> The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. . . . *United States v. Bailey,* 444 U.S. 394, 414 (1980). (Necessity defense analysis.)

The Texas courts in this case determined *as a matter of law,* that the necessity defense was not available to the petitioner solely because abortion is not a legal harm, not for a lack of evidence to support the elements of the statutory necessity defense. Denying an accused the right to have the jury consider his defense denies a "fundamental element of due process of law", *Washington v. State of Texas, Supra,* at 20, *Faretta v. California,* 422 U.S. 806 (1975); denies due process because jurors are the judges of the credibility of witness testimony, *United States v. Bailey, Supra* at 414; violates the sixth amendment right to a fair trial, *Cheek v. United States,* 111 S.Ct. 604, 611 (1991) (Transforming a factual inquiry into a legal one preventing a jury from considering evidence that might excuse an offense violates the sixth amendment jury trial provision.); *United States v. Middleton,* 690 F.2d 820 (11th Cir. 1982) Certiorari Denied 103 U.S. 1051 (A trial court must instruct a jury regarding a defense issue and cannot determine the existence of such a defense as a matter of law.); is "impermissible" because it is a directed verdict against the accused, *Strauss v. United States,* 376 F.2d 416, 419 (5 Cir. 1967);

Denial of petitioner's defense of necessity for jury consideration that could justify petitioner's conduct prevents jury determination of factual issues, and that right is so rooted in traditions and embodied in the United States Constitution as to be ranked as fundamental. The rulings of the Texas courts deprived petitioner of a fair trial. This case should be remanded for retrial with the constitutional right to jury instructions on the defenses raised.

**B. The selective imposition of a legal requirement that the harm to be avoided in the necessity defense must be a "legal harm" requires an unequal burden which denies fourteenth amendment equal protection of the law and is irrational.**

The appellate court did not report that the petitioner's admitted evidence for the defense of necessity was defective in any statutory requirements of Texas Penal Code 9.22, and the facts are clear that all statutory requirements for instructions to the jury were met. The appellate court *held as a matter of law* that the defense of necessity is not available where the harm sought to be prevented is abortion since abortion is not illegal. The appellate court does not hold that abortion is not a harm, it simply excludes harms that are not legal, citing *Brumley v. State*, 804 S.W.2d 148 (Tex. App. – Amarillo 1991, no pet.); *Boushey v. State*, 804 S.W.2d 148 (Tex. App. – Corpus Christi 1990, pet ref'd); *Reed v. State*, 794 S.W.2d 806, 810 (Tex. App. – Houston [14th Dist.] 1990, pet. ref'd) cert. denied, 111 S.Ct. 2018 (1991). The appellate court and other Texas courts it follows on this issue have amended the Texas statutory definition of harm, Tex. Penal Code 1.07 (16), making an additional requirement that harm must be a legal harm for benefit of the necessity defense.

Such power is denied by the Texas Constitution and acknowledged by the Texas Supreme Court.

> . . . we are more impressed with the provisions of our constitution which vest the legislature with all law making power. We can construe the acts of the legislature but we cannot amend them. *Ex Parte Hayden,* 215 S.W.2d 620, 623 (1941).

The Texas courts have provided no reasons for denying the necessity defense where the harm sought to be avoided is not a legal harm and there is no justification for such exclusion.

*What is harm*? Tex. Penal Code 1.07(16) defines harm as:

> anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

The Practice Commentary to 9.22 notes:

> "Necessity is a general principle and as a practical matter it would be impossible to describe and rank the myriad variety of harms to avoid which a person is justified in committing an offense. Likewise, what is 'harm' and what 'harms' are greater than others are questions purposefully left to case-by-case determination."

The requirement that harm be a "legal harm" is anomalous to case law in Texas and other states. In *Thomas v. State,* 678 S.W.2d 82, (Tex. Cr. App.1984), a defendant charged with robbery of the arresting officer's gun, after he was legally arrested, testified he believed the arresting officer was going to shoot him. The Texas Court of Criminal Appeals held that the defendant was entitled to have a jury charge on the defense of necessity. The Illinois Supreme Court in *City of Chicago v. Mayer,* 308 N.W.2d 601 (1974) also expressly permitted the necessity

defense to prevent a harm arising from legal human activity. A medical student was arrested for interfering with police attempts to remove an injured, arrested student, from the street without a stretcher. The medical student claimed that he had reason to believe the fallen demonstrator had suffered injury to his spinal column and, to prevent further injury, he attempted to prevent the officers from lifting the injured man. The officers' conduct in Texas and Illinois was clearly not a "legal harm". Indeed, the officers contended they were performing their legal duties.

Abortion related trespass is the only offense in Texas where the necessity defense is denied when sufficient evidence is presented for the defense. Texas appellate courts have consistently held, except in abortion related trespass cases, that the necessity defense is a factual issue to be decided by the jury. "It should have been for the jury to determine whether to believe appellant's testimony, and, if the testimony was believed whether the circumstances testified to meet the criteria of 9.22." *Armstrong v. State*, 653 S.W.2d 810, 811 (Tex. Crim. App. 1983). Accord: *Williams v. State*, 630, S.W.2d 640 (Tex. Crim. App. 1982); *Thomas v. State*, 678 S.W.2d 82 (Tex. Crim. App. 1984); *Fitzgerald v. State*, 782 S.W.2d 876, 884-885 (Tex. Crim. App. 1990).

Justice Rossman, specially concurring in *State v. Clowes*, 785 P.2d 1071 (Or. App. 1990) (Upholding an abortion clinic trespass conviction because the legislature had preempted the necessity defense), joined by Edmonds., J., reasons why the necessity defense should not be denied to those who avoid evils or harms that are not legal harms:

> Finally, the analysis [that only conduct to avoid illegal activities can benefit from the necessity defense] creates troubling anomalies.

> First, if one may only justify preventing the conduct of another if it is wrongful, it is difficult to understand why he would need a defense at all. Second, Judge Graber's position leads to the conclusion that one may justify trespass to save a VCR, because harm to property is "legal injury." However, trespass to save what a defendant might view as a human life is not justifiable, because destruction of a fetus is not a "legal injury," at least not in an abortion clinic. Indeed, the argument implies that existence of a fetus has no legal value, a dubious and disquieting proposition. (Citation omitted).
>
> . . . In short, it is unnecessary and in my view, unwise to deny defendants an opportunity to assert the choice of evils defense to the jury on the basis that abortion is not a "legal injury." That rationale could deprive some later defendant of an appropriate defense. Moreover, it is an unnecessary legal fiction with disturbing implications. *Id.* at 1080. (Examples why the necessity defense should not be limited to wrongful or legal harms. *Id,* at 1079.)

### C. The categorical legal exclusion of the necessity defense, solely because the harm in question is the killing of a human child before birth is invidiously discriminatory to the class of unborn humans.

The disturbing implications of denying the justification defense are tragically a historic reality. German laws that denied any justification defenses to protect human beings declared to be nonpersons under their law resulted in prison and death for many who gave aid and protection to Jews and other nonpersons, because killing Jews was not a "legal harm" under the German laws. Such examples are common in dictatorships. Though abortion was legalized as a constitutional liberty right by *Roe v. Wade,* the legality of killing unborn humans is far

from being settled, as four of the nine Justices disagree that abortion is a constitutional right. *Planned Parenthood of SE PA. v. Casey,* Nos. 91-744 and 91-902, ___ U.S. ___ (1992).

The legality of abortion, however, should not prevent the availability of the necessity defense in a criminal charge where the purpose is to prevent harm to unborn children because it is unmitigated discrimination, denial of equal protection of the law, and a mockery of law and justice to provide the justification defense of necessity for protection of animals and property but deny the same protection of the law for living unborn human children. It is betrayal of the greatest proclamation of human rights in the history of man to deny unborn children protection, because our founding fathers proclaimed: "We hold these truths to be self evident that all men are created (not born) equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, . . . . " It is invidious discrimination and tyranny to provide constitutional protection to a corporation, a legal fiction, but deny any protection to our living posterity, the very purpose of the Constitution as stated in the Preamble, and to further compound the injustice by denying a defendant jury determination of justification defenses in protection of the most helpless humans – living unborn children.

Surely, in view of evidence that the unborn child is sentient, separate from its mother, with the same individual genetic identity until death, a being with its sex determined, with discrete functioning organs, a heart beat, recordable brain waves, unique features, able to swim in the amniotic fluid, breathe, eat, digest, excrete, hear, and learn, the unborn child's death by dismemberment could be reasonably regarded as a greater harm than trespass on property.

Surely the founding fathers' declaration that "all men are created equal", the Congressional definition of a person as an "individual", the United Nations declaration that unborn children have the right to life, and the Supreme Court determination that persons for constitutional protection are "living, human, and have their being" are civilized men's guiding principles for human rights protections. But these noble principles are rejected when unborn children are denied any protection and criminal defendants are denied the constitutional right to have a jury determine the factual issues of their beliefs and the reasonableness of such beliefs as a greater harm than trespass.

Denial of the justification defense of necessity for jury determination when sufficient evidence is presented abandons "[t]he Anglo Saxon tradition of criminal justice embodied in the United States Constitution. . . . ", *United States v. Bailey, Supra,* at 414, and impairs the integrity of the jury system. Public confidence in the fairness of a criminal trial is diminished, and most seriously, the democratic process is thwarted.

## CONCLUSION

There is no valid basis for excluding unborn children, who are human beings, from the fundamental protections afforded all persons under the fourteenth amendment, including the protection of entitlement to lifesaving efforts on their behalf. This Court should therefore reconsider and overrule *Roe v. Wade,* 410 U.S. 113 (1973). The Texas statutes providing for the defense of necessity or protection of third persons are unconstitutional if they exclude unborn human beings from the class of persons entitled to protection through the exercise of that defense.

The categorical legal exclusion of the necessity defense solely because the harm in question is not a "legal harm." is unconstitutionally arbitrary, and denied petitioner the right to have the jury determine if his beliefs to avoid the harm of abortion were reasonable and more harmful than property trespass, thereby denying petitioner due process and a fair trial. The legal exclusion of the necessity defense further imposes an undue and unequal burden based on the selective legal imposition of an irrational requirement that the harm must be a "legal harm". The denial of the necessity defense for protection of unborn children is most objectionable because it is invidious discrimination against unborn human children, denying them all rights to be protected, but providing protection rights to animals, inanimate objects, and legal fictions.

If this Court does not allow protection of unborn children as for other human persons and acquit the petitioner of criminal trespass for his efforts to save unborn children from death, petitioner should be given his day in court and allowed to have a jury determine the reasonableness of his defense of justification by necessity as provided by traditional criminal justice embodied in the United States Constitution.

For the reasons and authorities set forth, it is submitted respectfully that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CLIFFORD L. ZARSKY
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Corpus Christi, Texas 78411
(512) 993-9341
Counsel of Record

**COURT OF APPEALS**

**FOURTH COURT OF APPEALS DISTRICT OF TEXAS**

**SAN ANTONIO**

OPINION

Appeal No. 04-91-00386-CR

James Michael SCHROEDER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from County Court at Law No. 9 of Bexar County
Trial Court No. 479,928
Honorable Timothy Johnson, Judge Presiding

Opinion by: David Peeples, Justice

Sitting: Shirley W. Butts, Justice
David Peeples, Justice
Ron Carr, Justice

Delivered and filed: January 29, 1992

AFFIRMED

Appellant was arrested for criminal trespass in connection with a protest at a San Antonio Clinic that performs abortions. He was convicted by a jury and sentenced by the court to 75 days in jail and a $1000 fine. Appellant does not dispute that the state proved the elements of criminal trespass. On appeal he claims only that the trial court erred in denying his request for jury instructions on necessity and defense of third persons, which he says justified his trespass. We affirm.

The defense of necessity[1] requires that the conduct to be prevented be a legal harm, an issue that the courts have decided adversely to appellant's position in similar cases. *See Brumley v. State*, 804 S.W.2d 659, 661 (Tex. App. – Amarillo 1991, no pet.); *Boushey v. State*, 804 S.W.2d 148, 151 (Tex. App. – Corpus Christi 1990, pet. ref'd); *Reed v. State*, 794 S.W.2d 806, 810 (Tex. App. – Houston [14th Dist.] 1990, pet. ref'd), *cert. denied*, 111 S. Ct. 2018 (1991). There is nothing in the record to indicate that anyone within the clinic was engaging in any activity that constitutes a legal harm, as the courts have interpreted that term. *See Brumley v. State, supra; Boushey v. State, supra; Reed v. State, supra; Bobo v. State*, 757 S.W.2d 58, 63 (Tex. App. – Houston [14th Dist.] 1988, pet. ref'd), *cert. denied*, 490 U.S. 1066 (1989).

One element of the defense of third persons[2] is that the force protected against must be unlawful, an issue

---

[1] Conduct is justified if:

> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
>
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing [sic] the conduct; and
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

TEX. PENAL CODE ANN. § 9.22 (Vernon 1974).

[2] A person is justified in using force or deadly force against another to protect a third person if:

(Continued on following page)

that has also been decided adversely to appellant. *See Brumley v. State*, 804 S.W.2d at 661; *Boushey v. State*, 804 S.W.2d at 150; *Erlandson v. State*, 763 S.W.2d 845, 852 (Tex. App. – Houston [14th Dist.] 1988, pet. ref'd), *cert. denied*, 110 S. Ct. 152 (1990); *Bobo v. State*, 757 S.W.2d at 63; *Crabb v. State*, 754 S.W.2d 742, 744 (Tex. App. – Houston [1st Dist.] 1988, pet. ref'd), *cert. denied*, 110 S. Ct. 65 (1990).

In oral argument, appellant asserted that this court is not bound by the precedents cited above, all of which come from our sister courts of appeals. Perhaps we are not *bound*, but the fact remains that both the Texas Court of Criminal Appeals and the United States Supreme Court have refused every opportunity to disagree with the law stated in these cases. At some point, we must conclude from the repeated refusals of petitions for discretionary review and denials of certiorari that the high courts, whose decisions we must follow, believe that the cases cited above correctly declared the controlling law, and we therefore consider ourselves bound to follow the precedents.

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(Continued from previous page)

> (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of [the Penal Code] in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
>
> (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

TEX. PENAL CODE ANN. § 9.33 (Vernon 1974).

Appellant's points of error are overruled; the judgment is affirmed.

DAVID PEEPLES

Justice

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OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 15, 1992

COA#: 04-91-00386-CR

OFFICIAL BUSINESS
STATE OF TEXAS
STATE PENALTY

RE: Case No. 0275-92
STYLE SHEARER, JAMES

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On this day Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

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P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: CLIFFORD L ZARSKY
4710 EVERHART
CORPUS CHRISTI TX 78411

App. 5

*COURT OF APPEALS*
*FOURTH COURT OF APPEALS DISTRICT*
*300 DOLOROSA, SUITE 3200*
*BEXAR COUNTY CRIMINAL JUSTICE CENTER*
*SAN ANTONIO, TEXAS 78205*
*HERB SCHAEFER, CLERK*

*May 14, 1992*

*Clifford L. Zarsky*
*Attorney at Law*
*4710 Everhart*
*Corpus Christi, TX 78411*

*Ed Shaughnessy, III*
*District Attorney's Office*
*Bexar County Justice Center*
*San Antonio, TX 78205*

*RE: Case No. 04-91-00386-CR*
*Trial Court No. 479928*

*Style: Schroeder, James Michael*
*v. The State of Texas*

*Dear Counsel:*

*The Court has this date issued the Mandate in the above styled and numbered cause.*

*Very Truly Yours,*

*HERB SCHAEFER, CLERK*
*/s/ Cynthia A. Martinez,*
*Cynthia A. Martinez, Deputy*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION:

Preamble:

> WE THE PEOPLE of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America

Fifth Amendment, Due Process Clause:

> . . . [N]or shall (any person) be deprived of life, liberty, or property, without due process of law.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment:

> Section 1. Due Process and Equal Protection Clause:

> . . . [N]or shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5.
>
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. STATUTORY LAW:

1 U.S.C. 1

> In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include . . . individuals.

TEXAS STATUTORY LAW:

Texas Penal Code:

1.07 (a)(16) "Harm" means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested

1.07 (a)(17) "Individual" means a human being who has been born and is alive.

1.07 (a)(27) "Person" means an individual, corporation, or association.

9.22: Conduct is justified if:

1. The actor reasonably believes the conduct is immediately necessary to avoid imminent harm.

2. The desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing the conduct, and

3. A legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

9.33: A person is justified in using force or deadly force against another to protect a third person if:

1. Under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself agianst the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

2. The actor reasonable believes that his intervention is immediately necessary to protect the third person.